were opposed to the settled policy of that state. Clearly, if the disability imposed by the Texas law on the capacity of married women to contract was total or general, it would violate the public policy of Texas to enforce the contract, and, therefore, the court should substitute the *lex fori* to protect its citizens. However, it does not appear from the opinion whether the incapacity was total, or whether only partial.[12] The reasoning is that since these particular contracts of a married woman as guarantor are void in Texas, it follows that to enforce a contract of this nature would contravene the public policy of Texas. It is submitted with the greatest deference that if such a rule is applied to contracts of this sort made in other states, the result will be that such contracts will in most cases be enforceable only in the state where made. And if the same principle be applied to contracts generally, so that the courts of the forum will refuse to enforce any contract valid by its proper law simply because the *lex fori* declares it void, on the ground that the contract would violate the policy of the forum, it would go far to destroy the whole science of private international law applicable to foreign contracts, as it has been painfully built up through the centuries. By such a rule the other great policy which every state recognizes of upholding contracts valid where made is utterly disregarded.

RIGHT OF READOPTED CHILD TO INHERIT FROM THE FORMER ADOPTIVE PARENTS.—Though adoption was recognized by the civil law and the laws of many of the ancient nations, it was entirely unknown to the common law of England. And in the United States adoption exists only by virtue of statutes giving the right to create that status.[1] In the older systems of laws where adoption has been practiced for a long time the rights of adopted children have been well settled, and the adopted child is considered just as much the child of its foster parents as if born to them in wedlock.[2] But in the United States the courts have found difficulty in harmonizing this doctrine with the idea that is deep-seated in us, that the child born to its parents is no less their child even though the legislature provides that it may become the child of another by adoption. Since adoption statutes are in derogation of the common law and are opposed to the theory on which our laws of

[12] In the report of the case in the Circuit Court of Appeals, Grosman *v.* Union Trust Co. (C. C. A.), 228 Fed. 610, Ann. Cas. 1917B, 613, it is seen, as a matter of fact, that the Texas laws imposed only a partial disability upon the capacity of married women to contract.

[1] Hence if the adoption statute is void, no rights can be created by an adoption. Albring *v.* Ward, 137 Mich. 352, 100 N. W. 609. On the other hand, if a child is validly adopted in compliance with the laws of one state, the status of adoption will be recognized in any other state. Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321; Van Matre *v.* Sankey, 148 Ill. 536.

[2] Vidal *v.* Commagere, 13 La. Ann. 516.

descent are based—that inheritances should pass to the nearest blood relations—they have been strictly construed by the courts. Some of the conflict among the cases can be attributed to the difference in substance between the statutes in the various states, but it is much more due to the highly technical construction of the phraseology of the different acts. In many cases statutes apparently having the same purpose and which are practically the same in substance have been differently interpreted by different courts, and as a result the legislative intent has in many cases been nullified by an observance of the words rather than of the intent. No doubt when adoption has become a more common practice and has been recognized for a long time, the courts of the United States will fit the status of adoption in with the common law and rid us of the present inconsistencies.

The adoption statutes in the United States seem to fall into two classes; (1) those which expressly provide, or which the courts construe to provide, that the adopted child shall become the same as a natural child for all purposes, and which divest the natural parents of all relation and right to the child which they have consented that another adopt;[3] and (2) those which expressly, or impliedly under the construction of the courts, make the adopted child the child of the foster parents only for certain purposes, while not completely severing the relation between the child and his natural parents.[4] Under this second class of statutes, or rather under the construction that such statutes have generally received, many situations arise that present grave inconsistencies.

One question which arises is whether the adopted child may inherit from both his foster parents and his natural parents. The statutes usually provide that the child shall inherit from his foster parents as if he were one of their natural children. Some statutes expressly provide that the child shall inherit also from his natural parents,[5] but usually the statute is silent on this point. The majority of the courts in such a case hold that the adopted child may inherit from both his foster parents and his natural parents, on the ground that the parents cannot take away the right of the child to inherit from his natural parents by contracting without his consent to give him to other parents.[6] But this reasoning overlooks the injustice that is worked upon the other children of the natural parents. Usually,

[3] The Virginia statute seems to be of this character. Va. Code, § 2614a.

[4] In Taylor *v.* Deseve, 81 Tex. 246, 16 S. W. 1008, it was said that adoption in Texas does not entitle the adoptive parents to the custody of the child, but is only for the purpose of giving the adoptive parents an heir. The Missouri statute does not seem to effect a much greater change of status. Hockaday *v.* Lynn, 200 Mo. 456, 98 S. W. 585, 118 Am. St. Rep. 672, 8 L. R. A. (N. S.) 117, 9 Ann. Cas. 775. It appears that an adopted child cannot inherit from his adoptive parents in the District of Columbia, but can take from them only by will. Moore *v.* Hoffman, 2 Hayw. & H. 173, Fed. Cas. 9,764a.

[5] In re Macrae, 189 N. Y. 142, 81 N. E. 956, 12 Ann. Cas. 505.

[6] Wagner *v.* Varner, 50 Iowa 532; Delano *v.* Bruerton, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698; Hockaday *v.* Lynn, *supra.*

the adopted child is placed in much better surroundings by the change of family, while the other children must continue to live in the same circumstances, for parents do not as a rule consent to an adoption unless they think it is to the advantage of the child. Why then should the adopted child receive any part of their inheritance, especially when he is the heir to the adopting parents?

Another vexatious question is whether or not the change of status is effected only between the adopting parents, the natural parents, and the child, or whether the change is complete so that the adopted child becomes the relation of all the lineal and collateral kindred of the adopting parents, and ceases to be the relation of his natural lineal and collateral relatives. Many of the courts have held, under statutes which did not expressly cover the point, that the change of status is effected only between the immediate parties, and that the adopted child is no kin to the relatives of the adopting parents, but remains the relative of his natural lineal and collateral relatives.[7] The basis of this holding is that since the statute is to be strictly construed and as it does not expressly provide for the case, the change of relation will not be beyond what is expressly provided for. Other courts hold that the adopted child becomes the relation of all the kin of the adopting parents as if he were born to them, and that he ceases to be related to his former kin.[8] The latter view seems to be better and seems to carry out the legislative intent. However, statutes in some states expressly provide that the adopted child shall become the relation of all the kin of the adopting parents.[9]

A curious situation arises where grandparents adopt a grandchild. Under the majority view in the United States it would seem that on the death of the grandparents, the adopted child would inherit not only as child but also as grandchild, since lineal kindred of the natural parents remain the kindred of the child under this view. But the inconsistency of this view is shown by the fact that in this case an exception is made, and the child is not allowed to

[7] Baker *v.* Clowser, 158 Iowa 156, 138 N. W. 837, 43 L. R. A. (N. S.) 1056; In re Darling's Estate, 173 Cal. 221, 159 Pac. 606; Hockaday *v.* Lynn, *supra*. However, under this view the change of status is complete between the immediate parties, so that on the death of the adopted child, his adoptive parents inherit from him to the exclusion of his natural parents. Humphries *v.* Davis, 100 Ind. 274, 50 Am. Rep. 788; Davis *v.* Krug, 95 Ind. 1; In re Johson, 164 Cal. 312, 128 Pac. 938, 43 L. R. A. (N. S.) 1062. See Va. Code, § 2614a. But in Upson *v.* Noble, 35 Ohio St. 655, it was held that upon the death of the adopted child the natural mother inherited to the exclusion of the foster sister of the adopted child.

[8] Power *v.* Hafley, 85 Ky. 671, 4 S. W. 683; Vidal *v.* Commagere, *supra*.

[9] Gilliam *v.* Guaranty Trust Co., 186 N. Y. 62, 78 N. E. 714, 116 Am. St. Rep. 536. In Warren *v.* Prescott, 84 Me. 483, 30 Am. St. Rep. 370, although the statute provided that adopted children could not inherit from lineal or collateral kindred of the adopting parents, yet an adopted child was allowed to take a legacy lapsed by the death of his adoptive parent.

inherit in a double capacity.[10] Under the better view the adopted child would cease to be the grandchild of the adopting grandparents and would become their child.[11]

There is much conflict as to whether an adopted child is within the meaning of the technical phrases "issue", "heirs of the body", "lawful heirs", etc. Some statutes expressly provide that an adopted child cannot take property limited to the heirs of the body of the adopting parent.[12] But if under this statute the property is limited to the children of the adopting parent it has been held that the adopting child may take, since the term "heirs of the body" is not synonymous with "children." [13] It has been held that the technical use of "issue", "heirs", "bodily heirs", etc., does not include adopted children, and that an adopted child could not take property limited to the foster parents and their "bodily heirs." [14] On the other hand, it has been held that the legislature makes adopted children to be included within these technical terms by providing that they shall have all the rights of natural children, and that the laws of descent do not attempt to define these terms, but simply to make general rules for inheritance.[15] In the case of *Hilpire* v. *Claude,*[16] it was held that a will was revoked on the adoption of a child just as if pretermitted issue had been born. And adoption statutes are not unconstitutional in allowing adopted children to be let into a class which has taken a contingent interest in property, because that interest does not vest until the death of the tenant of the preceding estate, and the legislature may enlarge or restrict the members of the class at any time before the interest vests.[17]

Probably the most difficult question arising in this connnection is in respect to the rights of the respective parties upon a readoption, or upon the death of the adopting parents. It has been held that upon the death of the adopting parents, the natural mother has

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[10] Delano *v.* Bruerton, *supra;* Billings *v.* Head (Ind.), 111 N. E. 177. In Head *v.* Leak (Ind.), 111 N. E. 952, it was held that the adopted child should inherit in that capacity in which he would receive most. In this case it was found that the adopted child's share as natural grandchild was greater than the share she would have received as adopted daughter of the intestate, and the court allowed her to inherit as grandchild.

[11] Morgan *v.* Reel, 213 Pa. 81, 62 Atl. 253.

[12] Sewall *v.* Roberts, 115 Mass. 262; Warren *v.* Prescott, *supra.*

[13] Sewall *v.* Roberts, *supra.*

[14] Clarkson *v.* Hatton, 143 Mo. 47, 44 S. W. 761, 65 Am. St. Rep. 635, 39 L. R. A. 748.

[15] Gilliam *v.* Guaranty Trust Co., *supra;* Dodin *v.* Dodin, 16 App. Div. 42, 44 N. Y. Supp. 800; Ross *v.* Ross, *supra.* In Morrison *v.* Estate of Sessions, 70 Mich. 297, 14 Am. St. Rep. 500, it was held that, although an adopted child was a lawful heir capable of taking under a will property limited to the lawful heirs of the deceased, yet if the adoption had been set aside—even though invalidly—before the making of the will, the adopted child could not take, since the testator did not intend that he should.

[16] 109 Iowa 159, 80 N. W. 332, 77 Am. St. Rep. 524.

[17] Gilliam *v.* Guaranty Trust Co., *supra;* Sewall *v.* Roberts, *supra.* See *contra,* Schafer *v.* Eneu, 54 Pa. St. 304.

no legal right to be appointed the guardian of the child, since she had surrendered this right by consenting to the adoption and the right did not revive upon the death of the adopting parents.[18] In the case of *In re Macrae,*[19] it was held that the natural mother was entitled to no notice of the second adoption of her child, a required by statute in the case of the first adoption, since she no longer had any interest in the child.

In the recent case of *In re Klapp's Estate* (Mich.), 164 N. W. 381, upon the death of the parents of a child, the child was adopted by a man and his wife. Upon the death of the adoptive mother, the child was adopted a second time with the consent of the first adoptive father. The first adoptive father died intestate and the child claimed the right to inherit certain property owned by him. The court held that upon the second adoption all relations between the adopted child and his first adopting parents were completely severed, and the adopted child could not inherit from his former adoptive parent. The decision seems eminently sound under either view as to how far the adoption effects a change of status. The only case found in point is the case of *Patterson* v. *Browning,*[20] which held that an adopted child could inherit from his former adoptive parents after being readopted by other foster parents. But the facts of this case are clearly distinguishable from those of the principal case. In the latter case a child was adopted by a widower who had three children by his former wife, and who had married again. Upon the death of the adoptive father, the child was adopted by another. Under the law of descents in Indiana, the property of the husband passed in fee simple to his second wife, but it was provided that if she had no issue by him, upon her death the land passed to the children of the former marriage, if any. The court held that the second adoption did not take away the right of the adopted child to take as one of the children of the former marriage.[21] In this case the interest of the adopted child in the land owned by the adoptive parent vested at his death, at which time the second adoption had not occurred. Therefore the second adoption clearly did not take away a right that had already vested. But in the principal case no rights had vested in the adopted child in respect to the property of the first adoptive parents, and at the time when they would have

[18] In re Masterson's Estate, 45 Wash. 48, 87 Pac. 1047, 122 Am. St. Rep. 886. In the case of In re Jobson, *supra*, it was held that the death of the adopting father did not terminate the status of the adopted child, for the change of status is not limited to the lives of the parties.

[19] *Supra.* But in Baskette *v.* Streight, 106 Tenn. 549, 62 S. W. 142, it was held that the natural mother had the legal right to the custody of the adopted child upon the death of the adopted father as against the wife of the adoptive father who did not join in the adoption proceedings.

[20] 146 Ind. 160, 44 N. E. 993.

[21] Under the Indiana statute the holding of the court that the adopted child would be considered a child of the first wife seems questionable. See dissenting opinion in the case.

vested in him—the death of the adoptive parent—he was no longer the child of his first adoptive parents.

The question seems never to have been directly passed on as to whether the court has the power to decree a second adoption when there is nothing in the statute which provides for readoption. In the principal case it was implied that the court must have this power, or else great hardship would be worked in many cases. Under the rule of strict construction which has been adopted by so many of the courts, it seems that the exercise of such power is extremely questionable unless authorized by statutory provision.[22]

WHETHER THE PERFORMANCE OF A PRE-EXISTING CONTRACTUAL DUTY CONSTITUTES SUFFICIENT CONSIDERATION FOR A NEW PROMISE.—Whether the performance of, or the promise to perform, a pre-existing contractual duty or obligation constitutes a sufficient consideration for a new promise is a perplexing question on which the courts are in irreconcilable conflict and which has called forth many learned articles by illustrious legal writers.[1]

The most generally accepted definition of consideration is "any detriment to the plaintiff suffered at the instance of the defendant, and on the faith of the defendant's promise." A somewhat broader definition is "any act or forbearance or promise, by one person given in exchange for the promise of another."[2] In its most common acceptation "detriment" does not include an act, forbearance, or promise already due from the promisee by reason of some pre-existing contractual obligation. But under another view "detriment" is any act, forbearance, or promise on the part of the promisee which involves a change of position on his part.[3]

I. WHEN PUBLIC POLICY INTERVENES.

When the pre-existing contractual obligation consists of some special duty to the public, the law will not sanction a second contract based upon the consideration that the promisee perform this duty. The most striking instances of this kind of contract are the cases of seamen. In *Harris* v. *Watson*,[4] the court held that a seaman could not recover additional compensation promised him by the master of the ship, after the desertion of some of the crew,

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[22] Va. Code, § 2614a, expressly provides for the vacation of the decree of adoption, if in the discretion of the court it is for the best interest of the child, and the restoration of the parties to their former status. There is no provision in regard to readoption.

[1] The Doctrine of Consideration in Bilateral Contracts, Clarence D. Ashley, 3 VA. LAW REV. 201; The Source of Consideration in Bilateral Contracts, Henry Winthrop Ballantine, 3 VA. LAW REV. 432; Two Theories of Consideration, James Barr Ames, 12 HARV. LAW REV. 515; 13 HARV. LAW REV. 29; Consideration in Bilateral Contracts, Samuel Williston, 27 HARV. LAW REV. 503.

[2] 12 HARV. LAW REV. 515.

[3] 12 HARV. LAW REV. 517.

[4] 1 Peake 102.